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9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**

11 MARIA BARBARITA H.
12 RODRIGUEZ, an individual,

13 Plaintiff,

14 vs.

15 BANK OF NEW YORK MELLON, et
16 al.,

17 Defendants.

CASE NO. 13cv1830-GPC-BLM

**ORDER GRANTING
DEFENDANTS' MOTION TO
DISMISS**

[Dkt. No. 14]

18
19 On August 7, 2013, Plaintiff Maria Barbarita H. Rodriguez ("Plaintiff") filed
20 a complaint ("Complaint") against defendants The Bank of New York Mellon fka
21 The Bank of New York, as Trustee for the Benefit of Certificateholders CWALT,
22 Inc., Alternative Loan Trust 2007-HY6, Mortgage Pass-Through Certificates, Series
23 2007-11Y6 (erroneously sued as Bank of New York Mellon) ("BNYM"); Bank of
24 America, N.A.; Mortgage Electronic Registration Systems, Inc. (erroneously sued as
25 Mortgage Electronic Registration System, Inc.); Merscorp Holdings, Inc.;
26 ReconTrust Company, N.A., "All persons unknown claiming any legal or equitable
27 right, title, estate, lien or interest in the property described in the complaint adverse
28 to Plaintiff's title, or any cloud on Plaintiff's title thereto," and Does 1-10

(collectively, “Defendants”). On September 13, 2013, Defendants filed a motion to dismiss, (Dkt. No. 14), pursuant to Federal Rule of Civil Procedure 12(b)(6), and a request for judicial notice, (Dkt. No. 15). The motion has been fully briefed. (Dkt. Nos. 19, 20.) Pursuant to L. Civ. R. 7.1(d)(1), the Court finds the matter suitable for adjudication without oral argument. For the reasons set out below, the Court **GRANTS** Defendants’ Motion to Dismiss the first through seventh, ninth, and tenth causes of action in Plaintiff’s Complaint without prejudice.

I. BACKGROUND

On May 9, 2007, Plaintiff completed a loan (“Loan”) for the property located at 1921 Rue Michelle, Chula Vista, California, 91913-1218 (“Property”), in the amount of \$444,000.00.¹ (RJN, Ex. A at 1-3.) The Loan was secured by a deed of trust (“Deed of Trust”) and a mortgage note (“Note”). (Dkt. No. 1, “Compl.” ¶¶ 39.) The Deed of Trust listed the beneficiary as Mortgage Electronic Registration System (“MERS”); the lender as Countrywide Home Loans, Inc. dba America’s Wholesale Lender; and the trustee as ReconTrust Company, N.A. (“ReconTrust”). (RJN, Ex. A at 2.)

On December 7, 2009, the San Diego County Recorder’s Office recorded a “Corporation Assignment of Deed of Trust” (“Assignment”) against the Property. (RJN, Ex. B.) Signed by “Regina Myles, Assistant Secretary” and notarized by notary public “Janet L. Koch,” the Assignment purported to assign and transfer all beneficial interest under the Deed of Trust to BNYM. (*Id.*) Plaintiff alleges the following defects in the Assignment: (1) Regina Myles is not an employee of MERS (Compl. ¶ 56); (2) neither Regina Myles nor MERS had legal authority to execute the Assignment (*id.*); (3) the Assignment was not properly notarized (Compl. ¶¶ 57-

¹Unless otherwise noted, the factual background is taken from the Complaint, (Dkt. No. 1), and Defendant’s Request for Judicial Notice, (Dkt. No. 15, “RJN,” Exhibits A-G). Defendants asks the Court to take judicial notice of exhibits A-G. (Dkt. No. 15.) Pursuant to Federal Rule of Evidence 201, the Court takes judicial notice of these documents because they are matters of public record or, alternatively, Plaintiff has cited to them in his Complaint. See Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001). See also, infra, Section III.

1 66). Due to these defects, Plaintiff alleges the Assignment is not legally valid and
2 that BNYM has no legal or equitable right, title, or interest in Plaintiff's mortgage
3 or Deed of Trust. (Compl. ¶¶ 68-69.)

4 Plaintiff alleges the identity of the beneficiary under Plaintiff's note or Deed
5 of Trust is currently unknown to Plaintiff. (Id. ¶ 74.) Plaintiff alleges making
6 payments in excess of \$75,000.00 to BNYM, in error, in response to BNYM
7 monthly billing statements. (Id. ¶ 84.)

8 On December 16, 2011, the San Diego County Recorder's Office recorded a
9 "Notice of Default and Election to Sell Under Deed of Trust" ("Notice of Default")
10 which stated that Plaintiff was in default on the Loan in the amount of \$89,172.27
11 as of 12/15/2011. (RJN, Ex. C.) The Notice of Default stated that "[t]o find out the
12 amount [Plaintiff] must pay, or to arrange for payment to stop the foreclosure,"
13 Plaintiff had to contact BNYM, "c/o Bank of America, N.A." (Id. at 2.) Bank of
14 America N.A. concurrently recorded a "California Declaration" dated December 9,
15 2011 declaring that "Pamela A. Lacy, MTG Servicing Specialist I" attempted "with
16 due diligence to contact the borrower in accordance with California Civil Code
17 Section 2923.5." (Id. at 4.) Plaintiff alleges attempting to contact Bank of America,
18 N.A., ReconTrust, and BNYM to discuss options to cure the default, only to be
19 redirected to other parties. (Compl. ¶ 89.) Plaintiff alleges she was not contacted by
20 a loan servicer during the fourteen days following the Notice of Default. (Id. ¶ 90.)

21 On March 26, 2012, the San Diego County Recorder's Office recorded a
22 "Notice of Trustee's Sale" which stated that ReconTrust, as "duly appointed trustee
23 pursuant to the [Deed of Trust]," would sell the Property held under the Deed of
24 Trust at public auction on April 17, 2012. (RJN, Ex. D.) The Notice of Trustee's
25 Sale, signed by "Sunita Narayanan, Asst Vice President" of ReconTrust, stated that
26 the obligation secured by the property to be sold "plus reasonable estimated costs,
27 expenses and advances" was \$542,138.55. (Id.)

28

1 On June 19, 2012, Plaintiff filed a complaint² in California Superior Court
 2 against BNYM, ReconTrust, BAC Home Loans Servicing, LP (formerly
 3 Countrywide Home Loans Servicing, LP), “all persons unknown claiming any legal
 4 or equitable right, title, estate, lien or interest in the property described in the
 5 complaint adverse to Plaintiff’s title, or any cloud on Plaintiff’s title thereto,” and
 6 Does 1-10. (RJN, Ex. E.) The complaint sought declaratory and compensatory relief
 7 as well as punitive damages for the fractionalization and securitization of Plaintiff’s
 8 loan which allegedly made Plaintiff’s promissory note unenforceable. (Id. at 5-8.)

9 On October 2, 2012, Plaintiff filed a first amended complaint. (RJN, Ex. F.)
 10 On March 8, 2013, Judge Judith F. Hayes granted defendants’ unopposed demurrer
 11 to the first amended complaint with prejudice, due to Plaintiff’s failure to “state
 12 sufficient facts to constitute the claims asserted therein” and failure to demonstrate
 13 that reasonable amendment could be made due to Plaintiff’s failure to file a written
 14 opposition to the demurrer. (RJN, Ex. G.)

15 On August 7, 2013, Plaintiff filed the U.S. District Court Complaint in the
 16 above-captioned matter. (Dkt. No. 1.) Plaintiff alleges ten causes of action, for: (1)
 17 Declaratory relief under 28 U.S.C. §§ 2201, 2202; (2) Cancellation of a voidable
 18 contract under Rev. & Tax Code §§ 23304.1, 23305A and Cal. Corp. Code §§
 19 191(C)(7); (3) Quasi-contract; (4) Negligence; (5) Violation of the Fair Debt
 20 Collection Practices Act (“FDCPA”), 15 U.S.C. § 1692 et seq.; (6) Violation of the
 21 California Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200, et
 22 seq.; (7) Accounting; (8) Cancellation of Instruments; (9) Quiet Title; and (10) to
 23 enjoin the trustee’s sale. (Id.)

24 Plaintiff alleges Defendants attempted to collect Plaintiff’s mortgage
 25 payments despite knowledge that Defendants “were not acting on behalf of the
 26 current pecuniary beneficiary” of Plaintiff’s note and the Deed of Trust. (Compl. ¶
 27 96.) Plaintiff further alleges that Defendants failed to properly credit payments

28 ²Case No. 37-2012-00099212-CU-OR-CTL

1 made by Plaintiff, incorrectly calculated interest on Plaintiff's accounts, and failed
 2 to accurately debit fees. (Compl. ¶ 97.) Plaintiff alleges readiness and willingness to
 3 "unconditionally tender [Plaintiff's] obligation" under the Deed of Trust. (Compl.
 4 ¶¶ 112-116.)

5 On September 13, 2013, Defendants filed the present motion to dismiss. (Dkt.
 6 No. 14.) Defendants argue Plaintiff's claims are barred by res judicata due to the
 7 dismissal of Plaintiff's state court action with prejudice. (Dkt. No. 14 at 3-6, 10-11.)
 8 Defendants further argue Plaintiff's causes of action fail to state a claim. (Id. at 6-7,
 9 11-18.)

10 II. STANDARD

11 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the
 12 sufficiency of a complaint. Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001).
 13 Dismissal is warranted under Rule 12(b)(6) where the complaint lacks a cognizable
 14 legal theory. Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir.
 15 1984); see Neitzke v. Williams, 490 U.S. 319, 326 (1989) ("Rule 12(b)(6) authorizes
 16 a court to dismiss a claim on the basis of a dispositive issue of law."). Alternatively,
 17 a complaint may be dismissed where it presents a cognizable legal theory yet fails to
 18 plead essential facts under that theory. Robertson, 749 F.2d at 534. While a plaintiff
 19 need not give "detailed factual allegations," a plaintiff must plead sufficient facts
 20 that, if true, "raise a right to relief above the speculative level." Bell Atlantic Corp.
 21 v. Twombly, 550 U.S. 544, 545 (2007). "To survive a motion to dismiss, a
 22 complaint must contain sufficient factual matter, accepted as true, to 'state a claim
 23 to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)
 24 (quoting Twombly, 550 U.S. at 547). A claim is facially plausible when the factual
 25 allegations permit "the court to draw the reasonable inference that the defendant is
 26 liable for the misconduct alleged." Id. In other words, "the non-conclusory 'factual
 27 content,' and reasonable inferences from that content, must be plausibly suggestive
 28 of a claim entitling the plaintiff to relief." Moss v. U.S. Secret Service, 572 F.3d

1 962, 969 (9th Cir. 2009). “Determining whether a complaint states a plausible claim
 2 for relief will . . . be a context-specific task that requires the reviewing court to draw
 3 on its judicial experience and common sense.” Iqbal, 556 U.S. at 679.

4 In reviewing a motion to dismiss under Rule 12(b)(6), the court must assume
 5 the truth of all factual allegations and must construe all inferences from them in the
 6 light most favorable to the nonmoving party. Thompson v. Davis, 295 F.3d 890, 895
 7 (9th Cir. 2002); Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996).
 8 Legal conclusions, however, need not be taken as true merely because they are cast
 9 in the form of factual allegations. Ileto v. Glock, Inc., 349 F.3d 1191, 1200 (9th Cir.
 10 2003); W. Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). When ruling
 11 on a motion to dismiss, the court may consider the facts alleged in the complaint,
 12 documents attached to the complaint, documents relied upon but not attached to the
 13 complaint when authenticity is not contested, and matters of which the court takes
 14 judicial notice. Lee v. Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001).

15 III. DISCUSSION

16 A. Judicial Notice

17 Defendants seeks judicial notice of seven documents: (1) a deed of trust
 18 recorded in the San Diego County Recorder’s Office as document number 2007-
 19 0327377 on May 14, 2007; (2) a corporation assignment of deed of trust recorded in
 20 the San Diego County Recorder’s Office as document number 2009-0674142 on
 21 December 7, 2009; (3) a notice of default recorded in the San Diego County
 22 Recorder’s Office as document number 2011-0676370 on December 16, 2011; (4) a
 23 notice of trustee’s sale recorded in the San Diego County Recorder’s Office as
 24 document number 2012-0172409 on March 26, 2012; (5) a complaint filed in
 25 Rodriguez v. Bank of New York et al., No. 37-2012-00099212-CU-OR-CTL before
 26 the California Superior Court on June 19, 2012; (6) a first amended complaint filed
 27 in the same case on October 2, 2012; and (7) a minute order from proceedings
 28 before Judge Judith F. Hayes on March 8, 2013 at 10:30 a.m. in Rodriguez v. Bank

1 of New York et al., No. 37-2012-00099212-CU-OR-CTL. (Dkt. No. 15.)

2 Under Federal Rule of Evidence 201(b), a district court may take notice of
 3 facts not subject to reasonable dispute that are capable of accurate and ready
 4 determination by resort to sources whose accuracy cannot reasonably be questioned.
 5 Fed. R. Evid. 201(b); see also Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th
 6 Cir. 2001) (noting that the court may take judicial notice of undisputed matters of
 7 public record), overruled on other grounds by Galbraith v. County of Santa Clara,
 8 307 F.3d 1119, 1125-26 (9th Cir. 2002). Courts have routinely taken judicial notice
 9 of records filed with the county recorder as well as pleadings filed with the state
 10 court. See e.g., Reyna Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 n. 6
 11 (9th Cir. 2006); Liebelt v. Quality Loan Serv. Corp., 2011 WL 741056, at *6 n. 2
 12 (N.D. Cal. 2011); Reynolds v. Applegate, 2011 WL 560757, at *1 n. 2 (N.D. Cal.
 13 2011); Giordano v. Wachovia Mortg., FSB, 2010 WL 5148428, at * 1 n. 2 (N.D.
 14 Cal. 2011). Here, Plaintiff does not object to Defendants' Request for Judicial
 15 Notice, and the documents are publically recorded documents or publically
 16 available state court filings. Thus, the Court finds that the accuracy of these
 17 documents cannot reasonably be questioned. Accordingly, the Court hereby takes
 18 judicial notice of Exhibits 1-7.

19 **B. Res Judicata**

20 Defendants contend Plaintiff's claims are precluded by the doctrine of res
 21 judicata because Plaintiff has already litigated the same claims in state court in
 22 Superior Court Case No. 37-2012-00099212-CU-OR-CTL filed on June 19, 2012.
 23 (RJN, Ex. E.) The state court sustained Defendants' demurrer to the first amended
 24 complaint without leave to amend and entered a judgment of dismissal with
 25 prejudice on March 8, 2013. (RJN, Ex. G.) Defendants argue Plaintiff's current
 26 claims either were or could have been litigated in the prior state court action, so the
 27 resolution of Plaintiff's claims in state court bars this action. (Dkt. No. 14 at 4-6,
 28 10-11.) Plaintiff responds only that Defendants' res judicata arguments are a "red

1 herring” and not properly raised in a Rule 12(b)(6) motion to dismiss.³ (Dkt. No. 19-
 2 1 at 6.) The Court concludes Defendants have not shown Plaintiff’s claims are
 3 barred by the doctrine of res judicata.

4 The Full Faith and Credit Act, 28 U.S.C. § 1738, requires that we “give the
 5 same preclusive effect to a state-court judgment as another court of that State would
 6 give.” Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518, 523 (1986). In other
 7 words, federal courts must give a state court judgment the same preclusive effect as
 8 would be given to that judgment under the law of the State in which the judgment
 9 was rendered. Migra v. Warren City Sch. Dist. Bd. of Ed., 465 U.S. 75, 81 (1984);
 10 see also Marrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 380 (1985)
 11 (federal court should determine the preclusive effect of a [earlier] state court
 12 judgment [through reference] to the law of the State in which judgment was
 13 rendered); Pension Trust Fund v. Triple A Mach. Shop, 942 F.2d 1457, 1460 (9th
 14 Cir. 1991) (examining California law for purposes of determining res judicata effect
 15 of an earlier California state court judgment).

16 To determine the preclusive effect of the California Superior Court judgment
 17 in this case, the Court looks to California law. See Palomar Mobilehome Park Ass’n
 18 v. City of San Marcos, 989 F.2d 362, 364 (9th Cir. 1993) Under California res
 19 judicata law, a final judgment of a state court precludes further proceedings if the
 20 proceedings are based on the same cause of action; unlike the federal courts, which
 21 apply a transactional nucleus of facts test, California courts employ the primary
 22 rights theory to determine what constitutes the same cause of action for claim
 23 preclusion purposes. Brodheim v. Cry, 584 F.3d 1262, 1268 (9th Cir. 2009). Under

24
 25 ³Plaintiff provides no legal support or authority for these arguments. The Court
 26 notes that courts regularly consider res judicata on motions to dismiss, see, e.g., Stewart
 27 v. U.S. Bancorp, 297 F.3d 953, 956 (9th Cir. 2002) (affirming district court’s grant of
 28 a Rule 12(b)(6) motion to dismiss based on res judicata); Best v. Fitzgerald, 81 Cal.
 App. 2d 965, 967 (1947) (affirming the trial court’s grant of a motion to dismiss based
 on res judicata), and may also consider the doctrine of res judicata *sua sponte*. Hawkins
v. Risley, 984 F.2d 321, 324 (9th Cir. 1993); McClain v. Apodaca, 793 F.2d 1031,
 1033 (9th Cir. 1986). Absent authority to the contrary, the Court finds it proper to
 consider Defendants’ res judicata arguments brought by the present motion.

1 the primary rights theory, res judicata precludes a plaintiff from litigating a claim if:
 2 (1) the claim relates to the same ‘primary right’ as the claim in the prior action; (2)
 3 the prior judgment was final and on the merits; and (3) the plaintiff was a party or in
 4 privity with the party in the prior action. Mir v. Little Co. of Mary Hosp., 844 F.2d
 5 646, 651 (9th Cir. 1988) (citing Trujillo v. County of Santa Clara, 775 F.2d 1359,
 6 1366 (9th Cir. 1985)).

7 **1. Plaintiff’s Primary Right**

8 The California “primary right” doctrine requires that “all claims based on the
 9 same cause of action [] be decided in a single suit; if not brought initially, they may
 10 not be raised at a later date.” Mycogen Corp. v. Monsanto Co., 28 Cal. 4th 888, 897
 11 (2002). For purposes of determining the application of preclusion, “the cause of
 12 action is the right to obtain redress for a harm suffered, regardless of the specific
 13 remedy sought or the legal theory (common law or statutory) advanced.” Boeken v.
 14 Philip Morris USA, Inc., 48 Cal. 4th 788, 798 (2010); Eichman v. Fotomat Corp.,
 15 147 Cal. App. 3d 1170, 1174 (1983) (“If an action involves the same injury to the
 16 plaintiff and the same wrong by the defendant then the same primary right is at
 17 stake even if in the second suit, the plaintiff pleads different theories of recovery,
 18 seeks different forms of relief and/or adds new facts supporting recovery.”) (internal
 19 citations omitted); Manufactured Home Comm. v. City of San Jose, 420 F.3d 1022,
 20 1032 (9th Cir. 2005) (“Different theories of recovery are not separate primary
 21 rights.”). In other words, “one injury gives rise to only one claim for relief.”
 22 Boeken, 48 Cal. 4th at 798. Thus, “under the primary rights theory, the
 23 determinative factor is the harm suffered,” and “[w]hen two actions involving the
 24 same parties seek compensation for the same harm, they generally involve the same
 25 primary right.” Id.

26 Here, the same plaintiff, Ms. Rodriguez, is seeking redress for the same
 27 primary right—an underlying claim for title to the property located at 1921 Rue
 28 Michelle, Chula Vista, CA 91913 due to defects in the loan documents and

1 securitization process—as in Plaintiff’s state court action. Plaintiff’s claims are
 2 grounded in the same alleged injury of wrongful foreclosure and the same wrongful
 3 acts by Defendants and therefore, the same primary right is at stake. See Eichman v.
 4 Fotomat Corp., 147 Cal. App. 3d 1170, 1175 (1983). Although Plaintiff raises new
 5 causes of action for quasi contract, violation the tax code, violation of 15 U.S.C. §
 6 1692 et seq., and for an accounting in Plaintiff’s federal court Complaint, (Dkt. No.
 7 1 at ¶¶ 131-38, 139-45, 156-70, 171-77), the fact that Plaintiff raises new theories
 8 for relief is not relevant for purposes of claim preclusion. Through different court
 9 proceedings, Plaintiff has been seeking relief for the alleged wrongful cloud on
 10 Plaintiff’s title to the Property and for wrongful foreclosure. The Court concludes
 11 that Plaintiff’s new claims in this Court arise from the same foreclosure process and
 12 documents as the state court actions and therefore arise out of the same primary
 13 right.

14 **2. Final Judgment on the Merits**

15 However, “in order for res judicata or collateral estoppel to apply there must
 16 be a final judgment or determination of an issue; that is, a judgment or
 17 determination that is final in the sense that no further judicial act remains to be done
 18 to end the litigation.” People v. Scott, 85 Cal. App. 4th 905, 919 (2000).
 19 “[J]udgments based upon sustaining of a general demurrer have given rise to an
 20 apparent conflict of decision, and careful distinctions must be drawn between the
 21 cases.” Goddard v. Security Title Ins. & Guarantee Co., 14 Cal. 2d 47, 52 (1939). In
 22 California, a judgment entered after the sustaining of a general demurrer is a
 23 judgment on the merits, and will “bar a second cause of action on the same facts” to
 24 the extent the judgment “adjudicates that the facts alleged do not establish a cause
 25 of action.” Palomar Mobilehome Park Ass’n v. City of San Marcos, 989 F.2d 362,
 26 364 (9th Cir. 1993). However, if “new or additional facts are alleged that cure the
 27 defects in the original pleading, it is settled that the former judgment is not a bar to
 28 the subsequent action whether or not plaintiff had an opportunity to amend his

1 complaint.” Crowley v. Modern Faucet Mfg. Co., 44 Cal. 2d 321, 323 (1955) (In
2 Bank).

3 The underlying purpose of res judicata and collateral estoppel is to prevent
4 the re-litigation of claims and issues already decided on the merits in a prior case. It
5 contemplates that the prior court adjudicated or considered the merits of the case.
6 Here, Plaintiff failed to oppose Defendants’ demurrer before the California Superior
7 Court, and the court sustained the demurrer without leave to amend, dismissing
8 Plaintiff’s complaint with prejudice. (Dkt. No. 15, Ex. G.) On the record now before
9 the Court, it is not clear whether the state court’s order was based on a review or
10 actual determination of the merits of Plaintiff’s claims. Defendants have not
11 provided the Court with authority that such a situation, where the court sustains an
12 unopposed demurrer without leave to amend and dismisses the complaint with
13 prejudice, constitutes a final judgment on the merits. Accordingly, the Court
14 concludes that Defendants have failed to establish that res judicata bars Plaintiff’s
15 Complaint and declines to address whether the “privity” element of res judicata is
16 met here.

17 **C. Failure to State a Claim**

18 In the alternative, Defendants move to dismiss Plaintiff’s first through
19 seventh, ninth, and tenth causes of action in the Complaint on the ground that
20 Plaintiff fails to state a plausible claim for relief. (Dkt. No. 14 at 6-7, 11-18.) The
21 Court will thus determine whether Plaintiff has sufficiently stated Plaintiff’s claims
22 for relief.

23 **1. First Cause of Action - Declaratory Relief**

24 Plaintiff alleges that Defendants do not have a “secured or unsecured legal,
25 equitable, or pecuniary interest in the lien evidenced by the Deed of Trust and that
26 the purported recorded assignments have no value since they were executed
27 fraudulently and without the authority, direct or indirect, stated or implied, of the
28 current beneficiary of the Note and Deed of Trust.” (Dkt. No. 1, Compl. ¶ 121.)

1 Plaintiff requests that the Court find that “BKNYM and the Doe Defendants have
 2 no right or interest in Plaintiff’s Note, Deed of Trust, or the Property; which
 3 authorizes them, in fact or as a matter of law, to any benefit or right set forth in the
 4 Note and Deed of Trust.” (Id. ¶ 127.)

5 Defendants move to dismiss arguing that Plaintiff’s declaratory relief claim
 6 fails because declaratory relief is not an independent cause of action. (Dkt. No. 14 at
 7 7.) Plaintiff opposes, arguing that dismissal is premature. (Dkt. No. 19-1 at 6-7.)

8 The Declaratory Judgment Act (“DJA”) provides that, “[i]n a case of actual
 9 controversy within its jurisdiction . . . any court of the United States, upon the filing
 10 of an appropriate pleading, may declare the rights and other legal relations of any
 11 interested party seeking such declaration, whether or not further relief is or could be
 12 sought.” 28 U.S.C. § 2201. “A declaratory judgment offers a means by which rights
 13 and obligations may be adjudicated in cases ‘brought by any interested party’
 14 involving an actual controversy that has not reached a stage at which either party
 15 may seek a coercive remedy and in cases where a party who could sue for coercive
 16 relief has not yet done so.” Seattle Audubon Soc. v. Moseley, 80 F.3d 1401, 1405
 17 (9th Cir. 1996). “Declaratory relief should be denied when it will neither serve a
 18 useful purpose in clarifying and settling the legal relations in issue nor terminate the
 19 proceedings and afford relief from the uncertainty and controversy faced by the
 20 parties,” United States v. State of Wash., 759 F.2d 1353, 1357 (9th Cir. 1985); a
 21 claim for declaratory relief is unnecessary where an adequate remedy exists under
 22 some other cause of action. Permpoon v. Wells Fargo Bank Nat’l Ass’n, No. 09-cv-
 23 01140-H (BLM), 2009 WL 3214321 at *5 (S.D. Cal. 2009) (quoting Manown v.
 24 Cal-Western Reconveyance Corp., No. 09 CV 1101 JM (JMA), 2009 WL 2406335,
 25 at *6 (S.D. Cal. 2009)).

26 The Court finds that the declaratory relief Plaintiff seeks is entirely
 27 commensurate with the relief sought through other causes of action. (Compare
 28 Compl. ¶¶ 125, 127 with Compl. ¶¶ 180-84.) Thus, Plaintiff’s declaratory relief

1 claim is duplicative and unnecessary. See United States v. State of Wash., 759 F.2d
 2 1353, 1357 (9th Cir. 1985). Accordingly, the Court GRANTS Defendants' motion
 3 to dismiss the first cause of action for declaratory relief without prejudice.

4 **2. Second Cause of Action - Cancellation of a Voidable Contract**

5 In the second cause of action, Plaintiff seeks cancellation of the Deed of Trust
 6 on the grounds that MERS, Merscorp, and the Doe Defendants failed to comply
 7 with California franchise tax laws, Rev. & Tax Code §§ 23304.1, 23304.1(b), and
 8 23305a. (Compl. ¶¶ 131-38.) Plaintiff argues MERS was not registered in California
 9 and had no legal authority to prepare and execute the Assignment or Deed of Trust.
 10 (Compl. ¶¶ 133-34, 136-37.)

11 Defendants argue MERS acted solely in its capacity as nominee for the lender
 12 in this case and that state and federal courts have confirmed the authority of MERS
 13 to execute an assignment of a deed of trust and substitution of trustee. (Id. at 12.)
 14 The Court agrees. "Courts have routinely recognized that MERS's conduct in
 15 California is within the permissible scope for an unregistered foreign corporation
 16 and thus is not governed by § 23304.1." Wallace v. Mortgage Elec. Registration
 17 Sys., Inc., No. CV 11-8039 ODW (MRWx), 2012 WL 94485 at *4 (C.D. Cal. 2012)
 18 (citing Castaneda v. Saxon Mortg. Servs., 687 F. Supp. 2d 1191, 1195 n.3 (E.D.
 19 Cal. 2009)); see also Baidoobonso-Iam v. Bank of Am. (Home Loans), No. CV 10-
 20 9171 CAS (MANx), 2011 WL 5870065 at *4 (C.D. Cal. 2011). Accordingly,
 21 because section 23304.1 does not apply to MERS's conduct in California, Plaintiff
 22 is unable to void the Assignment or Deed of Trust. Defendants' motion is
 23 GRANTED as to the second cause of action without prejudice.

24 **3. Quasi Contract**

25 In the Complaint's third cause of action, Plaintiff alleges that Defendants
 26 were unjustly enriched because they collected Plaintiff's monthly mortgage
 27 payments even though Defendants did not have an interest in Plaintiff's Note.
 28 (Compl. ¶¶ 140-41.) Plaintiff seeks restitution for payments made to BNYM.

1 (Compl. ¶ 145.)

2 Defendants argue that an express contract between the parties outlines the
3 rights and obligations of the parties, precluding quasi contract liability. (Dkt. No. 14
4 at 13-14.) Plaintiff opposes, arguing that no valid contract existed because the
5 purported Assignment transferring interest to Defendants were void. (Dkt. No. 19-1
6 at 7-8.)

7 “The theory of unjust enrichment requires one who acquires a benefit which
8 may not justly be retained, to return either the thing or its equivalent to the
9 aggrieved party so as not to be unjustly enriched.” Othworth v. So. Pac. Trans. Co.,
10 166 Cal. App. 3d 452, 460 (1985). “[A]n individual may be required to make
11 restitution if he is unjustly enriched at the expense of another. A person is enriched
12 if he receives a benefit at another’s expense. The term ‘benefit’ denotes any form of
13 advantage Even when a person has received a benefit from another, he is
14 required to make restitution only if the circumstances of its receipt or retention are
15 such that, as between the two persons, it is unjust for him to retain it.” F.D.I.C. v.
16 Dintino, 167 Cal. App. 4th 333, 346–47 (2008) (internal citations and quotations
17 omitted). The Ninth Circuit established that a claim of quasi-contract “does not lie
18 when an enforceable, binding agreement exists defining the rights of the parties.”
19 Paracor Finance, Inc. v. General Electric Capital Corp., 96 F.3d 1151, 1167 (9th Cir.
20 1996).

21 In Hunt v. U.S. Bank, No. EDCV 12-2171-VAP(OPx), 2013 WL 1398964, at
22 *8 (C.D. Cal. Apr. 3, 2013), Plaintiffs signed a Note and a Deed of Trust and it was
23 not disputed that any payments made were rightfully due under the Note. The
24 district court noted that to the extent that Defendants were unjustly enriched by
25 collecting money due another, Plaintiffs were not the “aggrieved party.” Id. The
26 “aggrieved” party would be the lender who was actually entitled to collect the debt
27 payment, not Plaintiffs. Id. Similarly, in this case, Plaintiff does not dispute that
28 payment is due under the Note. (See Dkt. No. 1, Compl. ¶ 24.) While Plaintiff

1 alleges that Defendants were unjustly enriched by receiving payments from
2 Plaintiff, as required under the Note, she is not the “aggrieved party” and cannot
3 bring a claim for quasi contract. See Hunt, 2013 WL 1398964 at *8. Moreover, the
4 underlying Note and Deed of Trust, the validity of which is not in dispute, is an
5 enforceable, binding agreement defining the rights of the parties. Therefore, a quasi
6 contract claim cannot lie. See Niranjan v. Bank of America, N.A., No. C12-5706
7 WHA, 2013 WL 2931636, at *2 (N.D. Cal. June 13, 2013) (quasi contract claim
8 fails because underlying deed of trust is still valid despite argument that the deed
9 and note were void at the time the note was sold into asset-backed securities pool
10 and MERS had no authority to transfer the deed). Accordingly, the Court GRANTS
11 Defendants’ motion to dismiss the quasi contract claim without prejudice.

12 **4. Negligence**

13 Plaintiff contends that Defendants had a duty to exercise reasonable care to
14 “follow California law with regard to enforcement of monetary obligations and to
15 refrain from taking or failing to take any action against Plaintiff that they did not
16 have the legal authority to do.” (Compl. ¶ 148.) Plaintiff alleges that BNYM
17 breached that duty by “collecting or demanding mortgage payments when they [did]
18 not have the right to enforce the obligation.” (Id.)

19 Defendants argue that there is no duty of care owed to Plaintiff because a
20 lender-borrower relationship does not give rise to an unconventional or fiduciary
21 relationship. (Dkt. No. 14 at 14-15.) Plaintiff opposes, maintaining that Defendants
22 owed her a duty of care because of their unconventional relationship. (Dkt. No. 19-1
23 at 10-13.)

24 Under California law, the elements of a claim for negligence are that: (1)
25 defendant had a legal duty to plaintiff, (2) defendant breached this duty, (3)
26 defendant was the proximate and legal cause of plaintiff's injury, and (4) plaintiff
27 suffered damage. Cal. Civ. Code § 1714; Merrill v. Navegar, Inc., 26 Cal. 4th 465,
28 500 (2001).

1 As a general rule, under California law, “a financial institution owes no duty
 2 of care to a borrower when the institution’s involvement in the loan transaction does
 3 not exceed the scope of its conventional role as a mere lender of money.” Nymark v.
 4 Heart Fed. Sav. & Loan Ass’n, 231 Cal. App. 3d 1089, 1095–96 (1991). However,
 5 “liability to a borrower for negligence arises only when the lender actively
 6 participates in the financed enterprise beyond the domain of the usual money
 7 lender.” Id. at 1096; Ansanelli v. J.P. Morgan Chase Bank, N.A., No. C 10-3892
 8 WHA, 2011 WL 1134451, at *11 (N.D. Cal. 2011) (court found duty of care where
 9 complaint alleged that defendant went beyond its role as a silent lender and loan
 10 servicer to offer an opportunity to plaintiffs for loan modification and to engage
 11 with them concerning the trial period plan).

12 The Court finds that Plaintiff’s contradictory claims fail to raise a plausible
 13 claim for relief under a negligence theory. Although the Court agrees that Plaintiff
 14 has alleged BNYM conduct beyond the domain of a usual money lender, (see
 15 Compl. ¶ 148), Plaintiff also alleges BNYM has no claim to any interest in
 16 Plaintiff’s Note or Deed of Trust “in any manner whatsoever,” (id. ¶ 70). Plaintiff
 17 fails to show how, absent a valid contractual relationship, Defendants owed any
 18 duty to Plaintiff to support a claim for negligence. Accordingly, the Court GRANTS
 19 Defendants’ motion to dismiss Plaintiff’s negligence claim without prejudice.

20 **5. Violation of 15 U.S.C. § 1692, et seq.**

21 Plaintiff contends that Defendants violated the Fair Debt Collection Practices
 22 Act (“FDCPA”), 15 U.S.C. § 1692, et seq., by falsely representing that Plaintiff’s
 23 debt was owing to Defendant BNYM and by attempting to collect on the Note under
 24 those false pretenses. (Compl. ¶ 154m.)

25 Defendants argue that Plaintiff does not allege Defendants are “debt
 26 collectors” as defined under the FDCPA, because neither creditors nor loan
 27 servicers fit within the statutory definition of “debt collector.” (Dkt. No. 14 at 7-8.)
 28 Defendants further argue that Plaintiff’s FDCPA allegations are time-barred. (Id. at

1 8.) Plaintiff opposes, disputing Defendants' characterization of BNYM as a creditor.
 2 (Dkt. No. 19-1 at 7-8.)

3 A debt collector is defined under the FDCPA as "any person who uses any
 4 instrumentality of interstate commerce or the mails in any business the principal
 5 purpose of which is the collection of any debts, or who regularly collects or
 6 attempts to collect, directly or indirectly, debts owed or due or asserted to be owed
 7 or due another." 15 U.S.C. § 1692a(6). The term does not include any person who
 8 collects any debt owed or due to the extent such activity concerns a debt which "was
 9 originated by such person" or "was not in default at the time it was obtained by such
 10 person." 15 U.S.C. §§ 1692a(6)(F) (ii), (iii). The FDCPA's definition of debt
 11 collector "does not include the consumer's creditors, a mortgage servicing company,
 12 or any assignee of the debt, so long as the debt was not in default at the time it was
 13 assigned." Nool v. HomeQ Serv., 653 F. Supp. 2d 1047, 1053 (E.D. Cal. 2009)
 14 (citing Perry v. Stewart Title Co., 756 F.2d 1197, 1208 (5th Cir. 1985)). Here,
 15 Plaintiff alleges Defendant BNYM collects debts for third parties and did not act in
 16 a legitimate capacity as a creditor, loan servicer, or assignee of the debt. (Compl. ¶
 17 154.) However, Plaintiff fails to allege debt collection activities by any Defendants
 18 other than BNYM. To the extent that Plaintiff seeks to hold Bank of America N.A.,
 19 MERS, Merscorp Holdings, Inc., ReconTrust, or the Doe Defendants liable under
 20 the FDCPA, the Court GRANTS Defendants' motion to dismiss Plaintiff's FDCPA
 21 claims against them without prejudice.

22 As to Plaintiff's FDCPA claim against BNYM, Plaintiff fails to oppose
 23 Defendants' claim that the statute of limitations on any alleged debt collection
 24 activity expired in March 2013. The statute of limitations for a claim under the
 25 FDCPA is one year. Specifically, 15 U.S.C. § 1692k(d) states: "[a]n action to
 26 enforce any liability created by this subchapter may be brought . . . within one year
 27 from the date on which the violation occurred." Plaintiff alleges BNYM debt
 28 collection activities in conjunction with the December 15, 2011 Notice of Default

1 and the March 22, 2012 Notice of Trustee's Sale. (Compl. ¶¶ 83-94.) Plaintiff
 2 alleges no ongoing debt collection activities by BNYM more recent than March 22,
 3 2012. The Court finds that, on the face of the Complaint, the statute of limitations
 4 on Plaintiff's FDCPA claim expired on March 22, 2013. Accordingly, the Court
 5 GRANTS Defendants' motion to dismiss the claim under the FDCPA, as to all
 6 Defendants, without prejudice.

7 **6. Violation of California Business & Professions Code § 17200, et seq.**

8 Plaintiff's sixth cause of action for violation of California's Unfair
 9 Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, is based on allegations
 10 that Defendants recorded multiple documents with the County Recorder that
 11 "Defendants knew and know contain deliberate misstatements, misrepresentations,
 12 and omissions" in violation of California Penal Code section 518 (extortion) and
 13 section 532f(a)(4) (mortgage fraud). (Compl. ¶¶ 157, 158.) Plaintiff further alleges
 14 Defendants engaged in unfair, fraudulent conduct, including: executing and
 15 recording false and misleading documents, demanding and accepting payments
 16 without a basis upon which to collect the payments, unauthorized reporting of late
 17 payments to credit bureaus, and using threats to forcibly evict Plaintiff. (Compl. ¶¶
 18 161a-161j.)

19 Defendants move to dismiss Plaintiff's claim under section 17200 on the
 20 grounds that Plaintiff's claim is "derivative of the allegations pled elsewhere in the
 21 complaint." (Dkt. No. 14 at 15.) Defendants further argue Plaintiff has "no remedy
 22 under § 17200" because Plaintiff cannot obtain restitution without alleging she is
 23 entitled to keep the payments she made. (*Id.* at 15.)

24 Section 17200 provides a cause of action for "unfair competition," which is
 25 defined as "any unlawful, unfair or fraudulent business act or practice." Cal. Bus. &
 26 Prof. Code § 17200. "Unlawful," "unfair," and "fraudulent" represent three separate
 27 and distinct theories of liability under California's UCL. Rubio v. Capital One
 28 Bank, 613 F.3d 1195, 1203 (9th Cir. 2010). "Unlawful" practices include "anything

1 that can properly be called a business practice and at the same time is forbidden by
 2 law.” Farmers Ins. Exch. v. Superior Court, 2 Cal. 4th 377, 383 (1992). Section
 3 17200 “borrows” violations of other laws and treats them as unlawful practices
 4 independently actionable under section 17200. Id. “Unfair” means any practice
 5 whose harm to the victim outweighs its benefits. Olsen v. Breeze, Inc., 48 Cal. App.
 6 4th 608, 618 (1996). “Fraudulent” as used in the statute does not refer to the
 7 common law tort of fraud, but rather requires a showing that members of the public
 8 are likely to be deceived. Id.; Bank of the West v. Superior Court, 2 Cal. 4th 1254,
 9 1267 (1992).

10 The Court finds that, despite Plaintiff’s lengthy allegations of Defendants’
 11 misconduct, Plaintiff has failed to establish standing to assert a violation of
 12 California’s Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200. A
 13 UCL claim must be brought “by a person who has suffered injury in fact and has
 14 lost money or property as a result of the unfair competition.” Cal. Bus. & Prof. Code
 15 § 17204. “This provision requires [a plaintiff] to show . . . a causal connection
 16 between” a defendant’s alleged UCL violation and Plaintiff’s loss of money or
 17 property. Rubio, 613 F.3d at 1203-04. In support of standing, Plaintiff claims she
 18 has been injured only in that “a cloud has been placed upon title to Plaintiff’s
 19 property and Defendants have failed to remove this cloud from Plaintiff’s title.”
 20 (Compl. ¶ 169.) This conclusory statement is insufficient to establish an inference
 21 that title to Plaintiff’s home was clouded as a result of Defendants’ alleged unfair
 22 business practices, as opposed to Plaintiff’s own failure to make payments on her
 23 mortgage. Plaintiff has thus failed to adequately plead that her “injury” was the
 24 “result of” Defendant’s alleged conduct. See Shkolnikov v. JPMorgan Chase Bank,
 25 No. 12-03996 JCS, 2012 WL 6553988 at *21 (N.D. Cal. 2012) (dismissing a UCL
 26 claim supported only by a bare standing allegation that “a cloud has been placed
 27 upon title to Plaintiff’s Property”); Gyene v. Steward Financial, Inc., No. CV 12-
 28 4355 DSF (AJWx), 2013 WL 146191 (C.D. Cal. 2013) (same). Accordingly, the

1 Court dismisses without prejudice Plaintiff's claim for violation of California's
2 UCL, Cal. Bus. & Prof. Code § 17200.

3 **7. Accounting**

4 Plaintiff alleges she is entitled to an accounting because she made mortgage
5 payments to Defendants for many years and is due money which cannot be
6 ascertained without an accounting. (Compl. ¶¶ 171-77.)

7 "A request for a legal accounting must be tethered to relevant actionable
8 claims." Hafiz v. Greenpoint Mortg. Funding, Inc., 652 F. Supp. 2d 1039, 1043
9 (N.D. Cal. 2009). Because each of Plaintiff's substantive claims for relief are
10 subject to dismissal, Plaintiff has not "anchored her request to any viable claims"
11 and her accounting claim cannot survive. See id. Accordingly, Plaintiff's cause of
12 action for accounting must be dismissed without prejudice.

13 **8. Cancellation of Instruments**

14 Plaintiff's eighth cause of action seeks to cancel the Deed of Trust, the
15 Corporation Assignment of Deed of Trust, the Notice of Default, and the Notice of
16 Trustee's Sale. (Compl. ¶¶ 178-84.) Defendants do not move to dismiss Plaintiff's
17 eighth cause of action in their motion to dismiss. (Dkt. No. 14.) The Court therefore
18 declines to address the sufficiency of Plaintiff's eighth cause of action.⁴

19 **9. Quiet Title**

20 Plaintiff's ninth cause of action seeks to quiet title. (Compl. ¶¶ 185-91.) Quiet
21 title claims may establish title against adverse claims to real property or any interest
22 therein. Cal. Civ. Proc. Code § 760.020. A complaint alleging such a claim must be
23 verified and include: (1) a description of the property; (2) the basis for plaintiff's
24 title; (3) the adverse claim or claims to title; (4) the date as of which the

25
26 ⁴The Court notes that the eighth cause of action appears to include Plaintiff's
27 general allegations regarding improper notarization and Regina Myles' employment
28 with MERS. (Compl. ¶¶ 56-66.) To the extent that these general allegations are not
addressed by Defendant's motion to dismiss and appear to be most closely related to
Plaintiff's eighth cause of action for cancellation of instruments, the Court also
declines to address the sufficiency of these allegations.

1 determination is sought; and (5) a prayer for determination of plaintiff's title against
2 adverse claims. Id. § 761.020.

3 Defendants argue Plaintiff's cause of action to quiet title fails to state a claim
4 because Plaintiff has not tendered the amount owing on the loan. (Dkt. No. 14 at
5 17.) Plaintiff responds that Defendant has no standing to assert or demand tender.
6 (Dkt. No. 19-1 at 19.)

7 As an initial matter, Plaintiff fails to meet the verification requirement. Cal
8 Civ. Proc. Code § 761.020. Furthermore, Plaintiff has not alleged tender of her
9 obligation. California law holds that Plaintiff cannot quiet title in the Property
10 "without discharging [Plaintiff's] mortgage debt. The cloud upon [her] title persists
11 until the debt is paid." Aguilar v. Bocci, 39 Cal. App. 3d 475 (Cal. Ct. App. 1974)
12 (citing Burns v. Hiatt, 149 Cal. 617 (Cal. 1906)). Plaintiff has no basis to quiet title
13 without first discharging Plaintiff's mortgage debt, and has put forth no legal
14 authority to the contrary. Accordingly, the Court grants Defendants' motion to
15 dismiss the quiet title cause of action without prejudice.

16 **10. Enjoin the Trustee's Sale**

17 Plaintiff's tenth and final cause of action seeks to enjoin the trustee's sale.
18 (Compl. ¶¶ 192-98.) Defendants argue that the Complaint fails to allege that any
19 foreclosure activity has been scheduled against the Property and that no clear sale
20 exists to enjoin. (Dkt. No. 14 at 17.) Plaintiff fails to rebut this argument in
21 opposition. Where there is no pending or imminent action to restrain, a request for
22 an injunction is unripe and will not be considered because doing so would result in
23 an impermissible advisory opinion. See United Public Workers v. Mitchell, 330
24 U.S. 75, 89 (1947). The Court therefore GRANTS without prejudice Defendants'
25 motion to dismiss Plaintiff's request for this Court to enjoin the Trustee's Sale.

26 **CONCLUSION**


27 Based on the above, the Court hereby GRANTS Defendants' motion to
28 dismiss and DISMISSES WITHOUT PREJUDICE the first through seventh, ninth,

1 and tenth causes of action in Plaintiff's Complaint.⁵

2 Plaintiff is granted thirty (30) days from the date this Order is electronically
3 docketed to file an amended complaint addressing the deficiencies set forth above.

4 IT IS SO ORDERED.

5 DATED: January 17, 2014

6 
7 HON. GONZALO P. CURIEL
8 United States District Judge
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⁵Plaintiff's eighth cause of action remains.